

**A Jayarena Construction Sdn Bhd (in liquidation) v AmBank
(M) Sdn Bhd (formerly known as Arab-Malaysian Finance
Bhd)**

B HIGH COURT (KUALA LUMPUR) — SUIT NO S-22NCVC-60 OF
2011
AMELIA TEE ABDULLAH J
28 OCTOBER 2011

C *Civil Procedure — Discontinuance — Notice of discontinuance — Right to re-file
action with leave — Filing afresh action — Whether mere filing afresh action
which had been discontinued amounted to abuse of process*

D *Civil Procedure — Striking out — Writ and statement of claim — Specific
performance for delivery of retail lots — Defendant granted credit facilities to
Sanjung Utama — Sanjung Utama defaulted in meeting its repayments —
Defendant sold units charged to it vide court order — Allegation that charge
documents were in relation to land and not retail lots — Plaintiff not party to
charge granted by developer to defendant — Plaintiff alleged purchasers of retail
units exempt from payment of redemption — Whether plaintiff's claim obviously
unsustainable — Whether pleading disclosed triable issues to be heard and
determined by court — Whether application to have matter struck out untenable*
F — *Rules of the High Court 1980 O 18 r 19(1) & O 92 r 4*

The plaintiff's claim against the defendant was for an order of specific performance for the delivery of 32 retail lots in Rhythm Avenue by Sanjung Utama Sdn Bhd ('Sanjung Utama'). Alternatively, the defendant was to replace the units with the value of the units at the offer price in 1995 or that the defendant pays a sum of RM15m which is equivalent to the present market value of the said retail lots. The defendant however, applied to strike off the plaintiff's claim, inter alia, on the grounds that the plaintiff had failed to disclose a reasonable cause of action against it and that the claim was scandalous, frivolous or vexatious. In the above case, the defendant averred that it had granted credit facilities to Sanjung Utama where the latter had executed a legal charge over the property in favour of the defendant to secure the credit facilities. At the time when the charge was executed and registered, no caveat was lodged by the plaintiff. As Sanjung Utama defaulted in meeting its repayments, the defendant had obtained an order of the court for the sale of all the 32 units. The defendant contended that the plaintiff had no right under the law to seek specific performance or damages from the defendant because the plaintiff was not a party to the charge granted by the developer to the defendant. The plaintiff however, contended that the charge documents were

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in relation to the land and had nothing to do with the 32 retail lots. The plaintiff's claim was thus in relation to the defendant's alleged misconduct in selling the 32 retail units to third parties when it possessed the full knowledge that the plaintiff was the beneficial owner of the said units. Further, the plaintiff averred that the purchasers of the 32 retail units and the other units were exempt from payment of redemption. The plaintiff further averred that the defendant had knowledge about the retail lots that had been bought by the plaintiff and that they were not subject to redemption.

Held, dismissing the plaintiff's application with costs:

- (1) It was only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19(1) of the Rules of the High Court 1980 ('RHC') and that this summary procedure can only be adopted when it can clearly be seen that a claim is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. So long as the pleadings disclose some cause of action or raise some question fit to be decided by the court, the mere fact that a case is weak and not likely to succeed at trial is no ground for the pleadings to be struck out (see paras 48–49).
- (2) This was not a plain and obvious case for striking out the writ of summons and statement of claim under O 18 r 19(1) of the RHC. The court was unable to conclude that the plaintiff's claim was so 'obviously unsustainable' such as to warrant the court to strike it out without a trial. This was because it had raised the following triable issues to be heard and determined during the hearing: (i) whether the 32 retail lots purchased by the plaintiff were agreed by the defendant to be exempt from payment of the redemption sum; whether there were any other conditions imposed for the waiver of the payment of the redemption sum; (ii) if the answer to (i) was in the affirmative, whether the plaintiff which was not a party to the charge over the property was entitled to challenge the foreclosure and sale of the property by the chargee; (iii) whether the defendant chargee was entitled to foreclose on the property charged where it has given its prior agreement to waive the requirement for a redemption sum over certain units and under certain specified circumstances; and (iv) if the answer to (iii) was in the negative, what were the remedies available to the plaintiff purchaser whose property had been sold by the charge (see paras 50–52).

[Bahasa Malaysia summary]

Tuntutan plaintif terhadap defendan adalah untuk perintah pelaksanaan spesifik bagi penghantaran 32 lot runcit di Rhythm Avenue oleh Sanjung Utama Sdn Bhd ('Sanjung Utama'). Secara alternatif, defendan akan menggantikan unit-unit tersebut dengan nilai unit-unit pada harga yang

- A ditawarkan dalam tahun 1995 atau bahawa defendan akan membayar jumlah sebanyak RM15 juta yang bersamaan dengan nilai pasaran sekarang lot runcit tersebut. Defendan walau bagaimanapun, memohon untuk membatalkan tuntutan plaintif, atas alasan bahawa plaintif telah gagal mendedahkan kausa tindakan yang munasabah terhadapnya dan bahawa tuntutan tersebut adalah
- B bersifat skandal, remeh dan menyusahkan. Di dalam kes di atas, defendan menyatakan bahawa ia telah memberikan kemudahan kredit kepada Sanjung Utama di mana Sanjung Utama telah memeterai gadaian sah bagi hartanah tersebut memihak kepada defendan untuk mendapatkan kemudahan kredit tersebut. Pada masa gadaian tersebut dimeterai dan didaftarkan, tiada kaveat yang dimasukkan oleh plaintif. Oleh sebab Sanjung Utama gagal membuat bayaran baliknya, defendan memperoleh perintah mahkamah untuk menjual kesemua 32 unit tersebut. Defendan menghujah bahawa plaintif tidak ada hak di bawah undang-undang untuk memohon pelaksanaan spesifik atau ganti rugi daripada defendan kerana plaintif bukan pihak kepada gadaian yang diberikan oleh pemaju kepada defendan. Plaintif, walau bagaimanapun, menghujah bahawa dokumen-dokumen gadaian adalah berkaitan dengan tanah tersebut dan tidak ada kaitan dengan 32 lot runcit. Tuntutan plaintif oleh itu adalah berkaitan dengan salah laku defendan yang didakwa dalam menjual 32 unit lot runcit kepada pihak ketiga apabila ia mempunyai
- E pengetahuan penuh bahawa plaintif adalah pemilik benefisial unit-unit tersebut. Selanjutnya, plaintif menyatakan bahawa pembeli-pembeli 32 unit tersebut dan lain-lain unit dikecualikan daripada membayar penebusan. Plaintif selanjutnya menghujah bahawa defendan mempunyai pengetahuan penuh mengenai lot-lot runcit tersebut yang dibeli oleh plaintif dan bahawa ia tidak tertakluk kepada penebusan.
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Diputuskan, menolak permohonan plaintif dengan kos:

- (1) Proses penghakiman terus di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') hanya diberikan di dalam kes-kes yang jelas dan nyata dan prosedur terus ini hanya boleh digunakan apabila jelas bahawa tuntutan tersebut jelas 'obviously unsustainable'. Ia tidak boleh dilaksanakan dengan penilaian kecil dokumen-dokumen dan fakta kes untuk memutuskan sama ada pihak tersebut mempunyai kausa tindakan atau pembelaan. Asalkan pliding mendedahkan sedikit kausa tindakan atau menimbulkan apa-apa persoalan yang sesuai untuk diputuskan oleh mahkamah, fakta semata-mata bahawa sesuatu kes itu adalah lemah atau tidak akan berjaya dalam perbicaraan bukan alasan untuk pliding dibatalkan (lihat perenggan 48–49).
- (2) Ini bukanlah kes yang jelas untuk writ saman dan penyata tuntutan dibatalkan di bawah A 18 k 19(1) KMT. Mahkamah tidak berupaya memutuskan bahawa tuntutan plaintif adalah 'obviously unsustainable' sehingga mewajarkan mahkamah membatalkannya tanpa perbicaraan. Ini adalah kerana ia telah membangkitkan isu untuk dibicarakan berikut

untuk dibicarakan dan diputuskan semasa perbicaraan: (i) sama ada 32 lot runcit yang dibeli oleh plaintif dipersetujui oleh defendan dikecualikan daripada bayaran jumlah penebusan; sama ada terdapat apa-apa syarat lain yang dikenakan bagi pengecualian bayaran jumlah penebusan; (ii) jika jawapan kepada (i) adalah ya, sama ada plaintif yang bukan pihak kepada gadaian terhadap hartanah berhak untuk mencabar halang tebus dan jualan hartanah oleh pemberi gadaian; (iii) sama ada defendan pemberi gadaian berhak untuk halang tebus hartanah yang digadai di mana ia memberikan persetujuan awalnya untuk mengecualikan keperluan untuk jumlah penebusan atas unit-unit tertentu dan di bawah keadaan yang tertentu yang dinyatakan; dan (iv) jika jawapan kepada (iii) adalah dalam negatif, apakah remedi yang ada untuk plaintif pembeli yang hartanahnya telah dijual oleh gadaian (lihat perenggan 50–52).]

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For a case on notice of discontinuance, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2661.

For cases on writ and statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7632–7635.

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Cases referred to

Attorney-General of the Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch 274 (refd)

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

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Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650, SC (refd)

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Joseph Manikam v Topwin Development Sdn Bhd & Ors [1987] CLJ (Rep) 667 (refd)

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226, FC (refd)

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Peak Hua Industries Bhd v Peak Hua Holdings Bhd & Ors [2005] 6 MLJ 266, HC (refd)

Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Legislation referred to

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National Land Code ss 304, 340

Rules of the High Court 1980 O 18 r 19(1), O 18 r 19(1)(a), (b), (c), (d), O 92 r 4

Specific Relief Act 1950 ss 22, 26

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*K Kandiah (M Indrani with him) (Mohd Latip & Associates) for the plaintiff.
Yeong Zi Hao (Cheang & Ariff) for the defendant.*

Amelia Tee Abdullah J:

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[1] The plaintiff, Jayarena Construction Sdn Bhd (in liquidation) claims against the defendant, AmBank (M) Sdn Bhd, for an order of specific performance for the delivery of 32 retail lots in Rhythm Avenue by Sanjung Utama Sdn Bhd ('Sanjung Utama') and, alternatively, that the defendant replaces the units with the value of the units at the offer price in 1995 or, alternatively, that the defendant pays a sum of RM15m which is equivalent to the present market value of the 32 retail lots or, alternatively, that the defendant pays to the plaintiff special damages of RM4,560,000, general damages, interests and costs.

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[2] The plaintiff's claim is disputed by the defendant on the ground that the plaintiff is not entitled to any of the reliefs claimed. The defendant contends that it did not owe any duty of care to, and that it was not guilty of any act of negligence against, the plaintiff. It is the plaintiff's contention that it was a secured creditor with all the rights of a chargor and that it was not privy to any agreement between the plaintiff and the developer, Sanjung Utama.

THE AFFIDAVITS

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[3] Vide encl 4, the defendant has applied under O 18 r 19(1)(a), (b), (c) and/or (d) and/or O 92 r 4 of the Rules of the High Court 1980 ('RHC') for the plaintiff's statement of claim to be struck off on grounds that that the plaintiff had failed to disclose a reasonable cause of action against it, that the claim is scandalous, frivolous or vexatious, that the claim may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the court. The reasons as stated in encl 4 for the application are as follows:

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- (a) the plaintiff had no locus standi to commence this action against the defendant in the plaintiff's name as it was a company that had been wound up;
- (b) the plaintiff's action was mala fide and an abuse of the process of court as the plaintiff had commenced a similar suit against the defendant in Kuala Lumpur High Court Guaman No S5-22-949 of 2008;
- (c) the defendant did not owe a duty of care to the plaintiff and neither had it committed any act of negligence against the plaintiff;
- (d) the defendant as chargee was entitled to auction off the property in

accordance with the terms of the charge to secure the repayment of the credit facilities that had been granted to Sanjung Utama;

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(e) the defendant was not privy to the alleged agreements entered into between the plaintiff and Sanjung Utama; and

(f) the plaintiff was not a party to the charge over the property where the defendant was the chargee.

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[4] Vide an affidavit in support (encl 5), Chua Kee Waie, a manager in the defendant's Bahagian Pemulihan Pinjaman Kumpulan, averred as to the credit facilities that had been granted to Sanjung Utama consisting of an RM8m term loan and a RM42m bridging loan. The letter of offer dated 21 December 1998 was followed by the facilities agreement and debenture, both dated 10 February 1999 signed between the parties. Thereafter, Sanjung Utama had executed a legal charge over the property in favour of the defendant to secure the credit facilities including interest. At the time when charge was executed and registered, the defendant had caused a search to be made on the property and had found no caveats lodged by the plaintiff.

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[5] Sanjung Utama had subsequently defaulted in meeting its repayments to the defendant. On or about 2001, the project was abandoned. The defendant had then used its powers under the debenture to appoint receivers and managers for Sanjung Utama. The project was subsequently revived and completed.

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[6] On 1 December 2004, the defendant had obtained judgment against Sanjung Utama in Kuala Lumpur High Court Case No D1-22-270 of 2003 for a sum of RM28,496,419.77 as at 10 October 2002, interest and costs. On 25 May 2007, the defendant obtained an order for sale from the Shah Alam High Court in OS No MT3-24-2276 of 2006. The auction fixed for 29 January 2008 went on as scheduled and all 32 units were sold.

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[7] In para 24 of his affidavit in support, Chua Kee Waie avers that the plaintiff did not have a cause of action against the defendant as the defendant did not owe a duty of care to the plaintiff and the defendant had not committed any act of negligence against the plaintiff. He contends that the defendant had taken all necessary steps to ensure that Sanjung Utama had the capability to charge the property to the defendant.

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[8] Chua Kee Waie has also averred that as a secured creditor, the defendant was perfectly entitled to auction off the property to recover the credit facilities that were given to Sanjung Utama which had defaulted in its repayments. As chargee, the defendant had indefeasible rights over the property. The defendant

A contends that the plaintiff was negligent in not taking the necessary steps to ascertain if the property was charged before entering into sale and purchase agreements with Sanjung Utama.

B [9] Chua Kee Waie has also averred that the 32 units had never been redeemed.

C [10] The defendant also contends that the plaintiff's claim for specific performance and damages in lieu were totally without basis as the defendant was not privy to the sale and purchase agreements entered into between them and Sanjung Utama and therefore the defendants are not liable for the enforcement of the said agreements. Further the plaintiff is not a party to the charge and was not entitled in law to require the defendant to discharge the charge in respect of the 32 units.

D [11] The plaintiff has filed an affidavit (encl 7) through the liquidator, Dato' Abu Hanifah bin Noordin. In para 10 it is averred that the defendant had no beneficial interest in the 32 retail units owned by the plaintiff and the said units were not subject to redemption. However no reasons were given to explain the basis for this averment.

E [12] According to Dato' Abu Hanifah bin Noordin, the charge documents were in relation to the land held under HS (D) 1108337 PT 3462 Mukim Damansara, Daerah Petaling, Selangor and had nothing to do with the 32 retail lots. The defendant had been given notice by the plaintiff that it (the defendant) did not have any interest in the 32 units before the auction but the defendant had not heeded the notice but had proceeded with the auction.

F [13] The plaintiff's claim is thus in relation to the defendant's alleged misconduct in selling the 32 retail units to third parties when it possessed the full knowledge that the plaintiff was the beneficial owner of the said units. Following the terms of the sale and purchase agreement, the plaintiff was not allowed to enter any caveat over the said property and as such, the issue as to why it had not entered any caveat to protect its interest did not arise.

G [14] The plaintiff avers that the purchasers of the 32 retail units and the other units as set out in exh AHN4 were exempt from payment of redemption. Yap Kwee Huat, a director of the plaintiff, had vide its letter dated 26 June 2001, confirmed with the defendant that there will be no redemption imposed on the retail lots as per the attached lists. The lists shows retail kiosks at Level 1 with a value of RM3,713,600 and second floor units amounting to RM26,317,410, giving a grand total of RM30,031,010. The plaintiff had paid 95% of the purchase price of the 32 units. Reference was also made to a letter dated 27 May 2008 from Messrs Mohd Latip & Associates to the receivers and

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managers of Sanjung Utama to inform its readiness to pay the balance of RM240,000 in exchange for the keys to the 32 units.

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[15] Dato' Abu Hanifah bin Noordin avers that since the defendant had taken over the affairs of the plaintiff and appointed receivers and managers for the plaintiff, it follows there from that it had full knowledge of the sale and purchase agreements entered into between the plaintiff and Sanjung Utama in respect of the 32 lots. As such the defendant should have been given a monthly schedule listing all sales achieved, the names, and addresses of the purchases and the amounts paid.

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[16] Vide encl 8; Chua Kee Waie avers that since Sanjung Utama had failed to make scheduled repayments on the bridging loan, the plaintiff was required to make payment of the redemption sum if it desired that the 32 units be exempt from the order for sale. No letter of disclaimer had ever been issued by the defendant to the plaintiff in respect of the units claimed by the plaintiff. On 18 July 2006, the receivers and managers of Sanjung Utama had given notice to the plaintiff to pay a redemption sum of RM7,041,000 for the 32 units (CKW21). On 14 December 2006, the receivers and managers of Sanjung Utama again advised the plaintiff to settle the redemption sum to enable its property to be excluded from the foreclosure proceedings. It is indeed unfortunate that the plaintiff took no action to redeem the units.

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[17] In relation to Sanjung Utama's letter dated 26 June 2001, it is averred by Chua Kee Waie that the units stated in the letter and for which there is an alleged waiver of redemption are *not* the units claimed by the defendant. The first page refers to 'RAA Retail Kiosks (Level 1)' in respect of Rhythm Axis whilst the following page is merely the Rhythm Avenue price list for the second floor.

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[18] It is further averred that the defendant had vide its letter dated 28 January 2008 stated that the units had not yet been redeemed. Chua Kee Waie reiterates that the terms of the agreements entered into between the plaintiff and Sanjung Utama are not relevant.

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[19] On 4 April 2011, Dato' Abu Hanifah bin Noordin has affirmed another affidavit (encl 9) once again averring that the 32 retail lots were not subject to redemption. He avers that Sanjung Utama's letter dated 18 July 2006 to the plaintiff to remind it to pay the redemption sum to the defendant was irrelevant as the units were not subject to redemption. There was also an allegation that Sanjung Utama's letter had been sent to an 'alamat yang tidak wujud' because the plaintiff was in liquidation and there was no evidence that the letter had been sent to the plaintiff's liquidators.

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A [20] The plaintiff avers that the defendant had knowledge about the retail lots that had been bought by the plaintiff and that they were not subject to redemption. Reference was again made to exh AHN4. It was also explained that 'Rhythm Avenue' was the name for the whole project whereas 'Rhythm Axis' is the specific name for the retail lots. The plaintiff had also produced a letter from their then solicitors, Messrs James Edwin & Co, dated 28 January 2008 addressed to the liquidators as well as to the defendant stating that amongst the properties that were to be auctioned off the next day were 'those that the bank had no interest whatsoever' and enclosing a list of those properties. With this letter, the plaintiff sought to show that the defendant had knowledge of the plaintiff's claim and could have stopped the auction before it took place.

D [21] The plaintiff denied that the sale and purchase agreements between the plaintiff and Sanjung Utama were not relevant because the defendant had sold off the 32 units for which the plaintiff had paid 95% of the purchase price amounting to RM4.56m.

E [22] Vide *encl 10*, Chua Kee Waie had deposed that Sanjung Utama had admitted vide its letter dated 4 January 2008 dated that the units that were to be foreclosed were subject to redemption. This is a letter from Messrs James Edwin & Co to the liquidators of the plaintiff asking them to forward written consent to enable It 'to negotiate and compromise to secure the release or redemption of the assets which are subject to the foreclosure proceedings'.

THE LAW ON STRIKING OUT APPLICATIONS

G [23] The defendant's application for striking out is made under O 18 r 19(1)(a), (b), (c) and/or (d) and/or O 92 r 4 of the RHC. Order 18 r 19(1) of the RHC reads as follows:

H 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

- I** (a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[24] Order 92 r 4 provides for the inherent power of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

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[25] The court notes that the defendant is relying on all four limbs of O 18 r 19(1). In the case of *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, the Federal Court, in considering the question of whether affidavit evidence was admissible on a application under limb (a), had held as follows:

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It is therefore clear that in an application to strike out pleadings under O 18 r 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleadings, the court is prepared to say that the cause of action or the defence is obviously unsustainable (see *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).

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As such, in respect of this application, the court would *not* take into consideration affidavit evidence in determining whether the third defendant had made out a case under limb (a). However, in respect of the three other limbs, the averments of the parties in the affidavits can be considered.

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[26] The principles of law in relation to striking out applications are clear. The authority to be followed for such applications is the case of *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 where His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ held as follows:

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The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)) ...

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... It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v Lawson* (1915) 31 TLR 418 (CA)); (*Wenlock v Moloney*).

A THE SUBMISSIONS

[27] The defendant's submissions is premised on a few broad grounds, namely:

- B** (a) that the plaintiff's conduct in filing the current suit is an abuse of the court;
- (b) that the plaintiff has no right under the law to seek specific performance or damages from the defendant;
- C** (c) the defendant does not owe a duty of care to the plaintiff; and
- (d) the properties were unredeemed.

D [28] The issue initially raised as regards the authority and locus of the liquidator was not proceeded with by the defendant. As such, the court does not propose to deal with this issue.

WHETHER THE PLAINTIFF'S CONDUCT AN ABUSE OF THE COURT

E [29] It was pointed out by learned counsel for the defendant that the plaintiff had earlier filed a same suit against the defendant, the developer Sanjung Utama and Mohd Anwar Yahya, the receiver and manager in Kuala Lumpur High Court Guaman Sivil No S5-22-949 Tahun 2008. On 19 March 2009,

F the defendant had applied under O 19 r 18(1)(a), (b), (c) and (d) and O 92 r 4 of the RHC 1980 to strike out the plaintiff's claim. On 2 July 2009, the plaintiff had filed a notice of discontinuance.

G [30] The defendant complains that the plaintiff has now re-filed the suit only against the defendant and without claiming against the developer and the receiver and manager. Both suits are for specific performance and damages in relation to the units which the plaintiff had allegedly purchased from the developer. Reference was made to the case of *Peak Hua Industries Bhd v Peak Hua Holdings Bhd & Ors* [2005] 6 MLJ 266 where the High Court held that

H the failure of the plaintiff to explain why it had decided to discontinue the action against selected defendants who were key players in the events alleged by the plaintiff has to be construed as an abuse of process and to be frowned upon. The defendant submits that the plaintiff's conduct in discontinuing the previous suit after the defendant's striking out application shows that the

I plaintiff did not have a valid claim against the defendant.

[31] The plaintiff has not seen fit to respond to this submission apart from a mention that the previous action S5-22-949 of 2008 had been withdrawn on 2 July 2009.

[32] In looking at this issue, the court has considered the fact that there were two plaintiff's in the S5 suit, namely the plaintiff and one Avangarde Resources Bhd. Apart from the fact that the second plaintiff's unit had also been auctioned off, the court is uncertain as to the significance of the second plaintiff as a party in the S5 suit. The defendants in the S5 suit were the defendant, Sanjung Utama and one Mohd Anwar Yahya as the appointed receiver and manager.

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[33] The court notes that the notice of discontinuance was filed with leave to re-file the action. There could be any number of reasons why cases are discontinued and then re-filed. Without some clear indication that this was done in bad faith, the court would be loath to find that a mere filing afresh of an action which has been discontinued, without more, could amount to an abuse of process.

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RIGHT TO SEEK SPECIFIC PERFORMANCE/DAMAGES

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[34] The defendant contends that the plaintiff has no right under the law to seek specific performance or damages from the defendant because the plaintiff is not a party to the charge granted by the developer to the defendant. Conversely, the defendant is also not a party to the agreements entered into between the plaintiff's and Sanjung Utama and thus cannot be held accountable under the agreements.

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[35] Reference was made to s 22 of the Specific Relief Act 1950 ('SRA') which provides that the specific performance of a contract may be obtained by any party thereto. Similarly, s 26 of the SRA states that specific performance of a contract can be enforced against any party thereto. The defendant contends that as the plaintiff is neither the chargor nor the borrower under the charges, it has no right to claim for the discharge of the charges.

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[36] Similarly, as the plaintiff is not a party to the charge and the defendant is not a party to the agreement, the plaintiff is not entitled to sue the defendant for specific performance and damages.

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[37] The plaintiff's response on this issue is that although they are not a party to the bridging loan agreement, under the said loan agreement, Sanjung Utama would have to provide to the defendant a list of the purchasers and the amount of monies collected. As such, the defendant would have full knowledge that 95% of the purchase price of the 32 units had been paid by the plaintiff. The amount of monies collected would have been informed to the defendant by the receivers and managers appointed by the defendant itself. The plaintiff avers that the defendant would have full knowledge that the 32 units were not subject to redemption. The plaintiff further contends that whilst the defendant

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- A claims that it had an indefeasible right to the units, this is so only if the units were subject to be redeemed. The plaintiff relies on exh AHN4 as proof of its proposition that the units were exempt from redemption.

NO DUTY OF CARE

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- [38] The defendant submits that it owes no duty of care to the plaintiff. It is submitted that a chargee held an indefeasible interest in the land charged and that no dealing in the land subsequent to the charge can defeat that indefeasible interest. It follows there from that no one can challenge a chargee's right to exercise its power to auction off the property to satisfy the amount due to it from the developer. In this regard, reference was made to s 340 of the National Land Code which provides, inter alia, for the indefeasibility of title and interest of any interest or body in whose name any charge is registered, subject to certain provisions in the following subsections of the said section.

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- [39] As such, the defendant submits that even if the plaintiff, as the purchaser of the 32 units, had acquired any beneficial or equitable interest over the property, it is the defendant as chargee over the property who had priority over the land compared with the plaintiff. The defendant submits that decided authorities would show that the defendant is entitled to foreclose on the land in order to recover monies from the security of the loan defaulted by the chargor.

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PROPERTIES UNREDEEMED

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- [40] The properties were unredeemed. The defendant submits that the land must be redeemed to be excluded from the foreclosure action. In this case, the defendant had never issued any letter of disclaimer disclaiming the defendant's right to foreclosure over the 32 units.

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- [41] Reference was made to the fact that on 18 July 2006, the receivers and managers of Sanjung Utama had given notice to the plaintiff to pay a redemption sum of RM7,041,000 for the 32 units (CKW21). On 14 December 2006, the receivers and managers of Sanjung Utama had again advised the plaintiff to settle the redemption sum to enable its property to be excluded from the foreclosure proceedings. Unfortunately, the plaintiff did not pay anything to redeem the units.

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- I [42] And lastly, the defendant submits that the letter of 26 June 2001 which is admittedly the basis of the plaintiff's claim does not refer to the units claimed by the plaintiff. Whereas the first page refers to 'RAA Retail Kiosks (Level 1)' in respect of Rhythm Axis, the following page is merely a price list of properties which did not refer to the letter.

[43] On this issue, the plaintiff submits that the 32 units of retail lots are not subject to any redemption and thus are not encumbered to the defendant. Reliance was placed on a letter dated 26 June 2001 from Yap Kwee Huat, a director of the plaintiff, confirming that there will be no redemption imposed on the first RM30m of sales of the retail lots as per the attached lists. The lists shows retail kiosks at Level 1 valued at RM3,713,600 and second floor units amounting to RM26,317,410 thus giving a grand total of RM30,031,010. The plaintiff had paid 95% of the purchase price of the 32 units. The complaint is that the defendant had sold off the 32 retail lots despite knowing that they were not subject to redemption. Those retail lots bought at a price of RM4.8m are now valued at RM15m.

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FINDINGS

[44] The court finds that exh AHN4 did indeed refer, inter alia, to the plaintiff's 32 retail lots. The fact that the price of the retail kiosks at Level 1 amounted to RM3,713,600 whereas the price of the second floor units amounted to RM26,317,410 thus giving a grand total of RM30,031,010 is too much of a coincidence. The letter of the defendant dated 23 February 2000 agreeing to waive the requirement of redemption sum of up to the first RM30m of the sales value of the podium retail space would appear to be directly inter-linked.

D

E

[45] In the face of this waiver of the redemption sum, the court has considered the various authorities cited by the defendant in support of its contention of indefeasibility of title of the chargor. In the case of *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, Tanjung Petri Enterprise Sdn Bhd, the registered owner, had charged the land to Singapore Finance Ltd. Subsequently, Tanjung Petri entered into a sale and purchase agreement of the land with the respondent. The purchase price was paid. The appellant chargee obtained an order for sale to sell the charged land and applied to remove the caveat entered by the respondent. In holding that a chargee held an indefeasible interest in the land, the Supreme Court went on to say as follows:

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Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of its registration up to the completion of the judicial sale and the issue of the certificate of sale.

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I

[46] In the case of *Joseph Manikam v Topwin Development Sdn Bhd & Ors* [1987] CLJ (Rep) 667, the second defendant is the registered owner of an undivided piece of property. He charged the property in favour of the third

- A defendant bank as security for credit facilities extended to a firm in which the second defendant was the sole proprietor. By a joint venture agreement between the first and second defendants, the property was developed into a housing estate and the first defendant offered housing lots for sale to the public. One of the purchasers was the plaintiff. In order to protect his interest, he
- B lodged a private caveat over the lot. The second defendant defaulted in the repayment of his credit facilities. The third defendant proceeded to institute foreclosure proceedings but the plaintiff obtained an ex parte order against the third defendant to stay the auction. The third defendant then applied to set aside the ex parte order staying the auction, the removal of the plaintiff's private caveat and damages. As held by Siti Norma Yaakob J:
- C ... even if the third defendant was aware of the transaction between the plaintiff and the first defendant, it owes no duty or obligation to interfere in the affairs of the plaintiff. Whatever transaction undertaken by the plaintiff is strictly a private arrangement between him and the first defendant, to which the third defendant is not privy to.
- D The facts of the case before me are in the reverse in that the charge was created first and then came the sale and purchase agreement. There is no denying the fact that the plaintiff had acquired a beneficial interest over his lot but this is however subject to the prior right of the third defendant.
- E As the chargee of the property, the third defendant has an indefeasible title under s 304 of the National Land Code and in the absence of fraud, no one can challenge its rights to exercise its right to auction the property to satisfy the amount due to it from the chargor
- F [47] Another authority of considerable significance is the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 where the Federal Court held as follows:
- G But, even assuming that completion under the sale and purchase agreement and handing over by the developer chargor to the purchaser under the agreement of a duly executed, valid and registrable transfer of the disputed property to the purchaser under the agreement, had preceded the creation of the charge, it would still have been clearly wrong in law to decide the priority dispute in favour of the purchaser under the agreement. To reiterate, although unlike the applicable law in
- H Peninsular Malaysia and Sarawak, in Sabah there is no provision in the Land Ordinance conferring indefeasibility of title or interest in land on registration yet, Chapter V of the Land Ordinance and especially s 88, does imply the basic torrens concept that the title to or interest in land vests and divest only on registration.
- I We should add, that in law, there is no requirement that prior to the creation of a charge over land which is intended for development and sub-divided into lots for sale to the public, a chargee is under an obligation to ascertain that the lots have not been sold or that they are not the subject of sale and purchase agreements executed by a chargor as vendor. It goes without saying that it behoves a chargee to do so but, — we hasten to add — such an omission, even though it might constitute negligence would not constitute fraud within s 340(2)(a) of the Code.

- [48] In coming to a decision, the court has borne in mind that it is only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19(1) of the RHC and that this summary procedure can only be adopted when it can clearly be seen that a claim is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274, (CA)). It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. A
- [49] So long as the pleadings disclose some cause of action or raised some question fit to be decided by the court, the mere fact that a case is weak and not likely to succeed at trial is no ground for the pleadings to be struck out. B
- [50] After due consideration of the defendant's application made in this case, the court finds that the following would be triable issues to be heard and determined during the hearing, namely: C
- (a) whether the 32 retail lots purchased by the plaintiff were agreed by the defendant to be exempt from payment of the redemption sum; whether there were any other conditions imposed for the waiver of the payment of the redemption sum; D
 - (b) if the answer to (i) is in the affirmative, whether the plaintiff which is not a party to the charge over the property is entitled to challenge the foreclosure and sale of the property by the chargee; E
 - (c) whether the defendant chargee is entitled to foreclose on the property charged where it has given its prior agreement to waive the requirement for a redemption sum over certain units and under certain specified circumstances; and F
 - (d) if the answer to (iii) is in the negative, what are the remedies available to the plaintiff purchaser whose property has been sold by the chargee? G
- [51] In coming to a decision, the court is reminded of the words of Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power which should be exercised with the utmost caution. And in the words of the Supreme Court in *Bandar Builders*, it is only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19 which should only be adopted when it can clearly be seen that a claim is on the face of it 'obviously unsustainable'. So long as the proceedings disclose some cause of action or raise some question fit to be decided by the court, the mere fact that the case is weak and not likely to succeed at trial is no H
- I

A ground for the proceedings to be struck out.

CONCLUSION

B [52] After due and careful consideration of the application, the affidavits and
the arguments of the parties, the court finds that this is not a plain and obvious
case for striking out the writ of summons and statement of claim under O 18
r 19(1) of the RHC. The court is unable to conclude that the plaintiff's claim
is so 'obviously unsustainable' such as to warrant the court to strike it out
without a trial. Accordingly, the court herewith dismisses encl 4 with costs
C agreed between the parties at RM5,000.

Plaintiff's application dismissed with costs.

D Reported by Ashgar Ali Ali Mohamed

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